

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: June 8, 2005

TO : Gerald Kobell, Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: International Union of Operating Engineers,
Local 95-95A, AFL-CIO 560-7540-8060-3375
(110 Gulf Associates, LP) 560-7540-8070-1700 Case
6-CC-2032 560-7540-8070-6700

This case was submitted for advice on whether the Union violated Section 8(b)(4)(B) by picketing all entrances to a building owned and managed by the Employer and leased to multiple tenants, where the Employer had established a reserved entrance system. The Region has informed us that the primary and its suppliers have utilized and tainted the entrances reserved for neutrals. We agree with the Region that this is a valid ground for dismissal. The Region should not, however, also rely on General Electric¹ as supporting a dismissal because we have concluded that Moore Dry Dock,² not General Electric, controls here.

FACTS

Rugby Realty Co. is a real estate company operating in various states. On March 24, 2005, three of Rugby's principles, along with three other individuals, formed Frick Lender Associates (FLA) for the purpose of purchasing the Frick Building in downtown Pittsburgh. Frick Lender Associates contracted with 110 Gulf Associates (the Employer) to manage the Frick Building. The Employer is a limited partnership owned by the same partners that own Rugby Realty. The Employer also has contracts to manage several other Rugby office buildings in downtown Pittsburgh, including one called Gulf Tower.

The Employer has recognized the Greater Pennsylvania Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, Local Union 2145, as the exclusive collective bargaining representative of its

¹ Electrical Workers v. NLRB (General Electric), 366 U.S. 667, 676-677 (1961).

² Sailors Union of the Pacific (Moore Dry Dock), 92 NLRB 547 (1950).

production and maintenance employees working in its various office buildings in downtown Pittsburgh. The parties have a contract effective until October 31, 2008.

The prior owner of the Frick Building employed two "stationary engineers" who were members of a two-person bargaining unit represented by the International Union of Operating Engineers (the Union). After Frick Lender Associates bought the building, the Employer terminated the stationary engineers and transferred two of its employees represented by the Carpenters to work in the Frick building as "HVAC maintenance mechanics." The mechanics performed the same tasks that the stationary engineers performed.

The Employer has an office on the 13th floor of the Frick building, and a building manager and the two HVAC maintenance mechanics work exclusively at the building. Other 110 Gulf Associate employees perform work in the Frick building but are not permanently assigned there. The Employer also contracts with various companies to provide services, such as cleaning, security, elevator maintenance, and trash removal, to the Frick building.

The Union contacted the Employer about hiring the stationary engineers, but the Employer told the Union that it had a pre-existing collective bargaining agreement with the Carpenters covering employees working at the Frick building. The Union also claimed that the Employer was paying wages below area standards.

On March 31, 2005, the Union began picketing the Frick building, which is a block long rectangular building adjacent to three public streets and an alley in back. The building has a public entrance on each of the three public streets, bank entrances at two corners, and an entrance in the alley. The picket signs read: "110 Gulf Associates pays substandard wages & benefits - Engineers Local 95 - AFL-CIO."

By letter dated April 1, the Employer notified the Union that it had established a reserved gate system, under which only one, designated public entrance was to be used by the Employer's employees, agents, representatives, suppliers, and contractors. The Union continued to picket all entrances.

The Region has evidence indicating that, on numerous occasions since the establishment of the reserve gate system, the Employer's suppliers and independent contractors have used the neutral-designated entrances to the Frick building. Those parties include Otis Elevator, United Parcel Service, building cleaners, Federal Express, and individuals wearing "Gulf Tower" shirts.

ACTION

The Region has concluded that the reserved gate system has been tainted, and we agree that this is a valid ground for dismissal. The Region should not, however, dismiss the charge on an alternative General Electric theory.

A union may picket a primary employer with which it has a labor dispute, but it violates Section 8(b)(4) where it pickets a neutral party with an object of enmeshing the neutral in the labor dispute.³ Where a neutral employer performs separate tasks at the same situs as the primary employer, the Board is charged with balancing the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."⁴

In order to balance these dual objectives, the Board and courts have devised tests to determine the legality of union picketing at worksites shared by primary and neutral employers. Under the Moore Dry Dock test, the Board evaluates four criteria to determine whether the picketing is directed at the primary employer and, as much as possible, shields neutral employers from its effects. The Moore Dry Dock standard essentially requires a union to picket only the gate used by the primary employer with which it has a labor dispute and precludes picketing at gates set aside for neutral employers.⁵

³ Oil, Chemical and Atomic Workers International Union, Local 1-591, 325 NLRB 324, 326 (1998).

⁴ Id. at 327, citing NLRB v. Denver Building and Constr. Trades Council, 341 U.S. 675, 692 (1951).

⁵ Id. at 327.

The U.S. Supreme Court in General Electric and Carrier set forth a different "related work" test for use in situations where a union pickets a primary employer's premises at which a neutral employer is also working in some capacity for the primary employer.⁶ The Court determined that, in those situations, the test was whether the duties of the neutral employees were connected to the normal business operations of the primary employer.⁷ The Court reasoned that because protected, primary picketing is aimed at applying economic pressure to daily operations of the primary employer, a union should be permitted to appeal to all those approaching the situs whose mission is selling, delivering, or otherwise contributing to the primary's operation. In light of this traditional goal of primary pressure, the Supreme Court determined that Congress intended to preserve the right to picket an entrance reserved for neutrals who furnish day-to-day service essential to a plant's regular operations.⁸

The fact that the primary owns the property is not decisive in determining whether to apply the Moore Dry Dock or General Electric test.⁹ Thus, in General Electric, the Supreme Court cited with approval Retail Fruit & Vegetable Clerks (Crystal Palace Market),¹⁰ where the Board applied the Moore Dry Dock principles where the primary owned a shopping center and operated four of 64 shops in the center. Despite the employer's offer to allow the union to picket immediately adjacent to the four shops, the union picketed outside entrances utilized by the neutral stores. In applying Moore Dry Dock standards, the Board rejected the argument that the employer's title to the property was controlling, noting that the impact of the picketing on

⁶ General Electric, 366 U.S. at 680; United Steelworkers of America v. NLRB (Carrier), 376 U.S. 492, 497-98 (1964).

⁷ General Electric, 366 U.S. at 679; Carrier, 376 U.S. at 497-98. If, for instance, the neutral employees' duties involved new construction, that work would not be considered part of the employer's normal business operations and would not be "related work" under the Court's standard. General Electric, 366 U.S. at 680.

⁸ Carrier, 376 U.S. at 499.

⁹ See Carrier, 376 U.S. at 497.

¹⁰ 116 NLRB 856, 858 (1956), *enfd.* 249 F.2d 591 (9th Cir. 1957).

neutral employees was the same, regardless of who owned the premises.¹¹

Following the Crystal Palace and General Electric decisions, the Board has continued to apply Moore Dry Dock, not General Electric, to situations in which the primary owns the premises but leases or otherwise allows a neutral employer to utilize space on its premises to operate a separate business.¹² Thus, although Moore Dry Dock involved picketing at a common situs owned by a neutral employer, the Board has extended its rule to picketing at a primary employer's situs where a neutral employer is engaged in independent operations.¹³

Here, we conclude that Moore Dry Dock, not General Electric, controls. The Frick building is a common situs, with the Employer's affiliates renting space to multiple neutral employers that conduct businesses independent of the primary Employer. Thus, the tenants here are not entering the Frick Building to perform services for the Employer in furtherance of the Employer's operations of the building. Rather, they are operating their own businesses at the site. That the Employer owns the site does not in itself bring this case within the rationale of General Electric.¹⁴ Thus, absent the Region's finding that the

¹¹ Id. at 859.

¹² Newspaper Guild (Youngstown Arc Engraving), 153 NLRB 744, 746, 762 fn. 22 (1965) (applying Moore Dry Dock standard where primary owned and operated its business in building but leased some space in building to neutral employer which conducted its own, independent business in space); Carpenters Local Union No. 470 (Mueller-Anderson Inc.), 224 NLRB 315, 317 (1976) (applying Moore Dry Dock standard where primary general contractor was erecting apartment complex on land that it owned and several neutral subcontractors were also working at the site), enfd. 564 F.2d 1360 (9th Cir. 1977); see also United Mine Workers of America, District 2 (Jeddo Coal), 334 NLRB 677, 687 (2001) (citing Crystal Palace for proposition that fact that primary owned property upon which neutral was conducting its business was not determinative because legality of picketing does not depend on title to property).

¹³ United Mine Workers of America, 224 NLRB at 317.

¹⁴ See Carrier, 376 U.S. at 497; United Mine Workers of America, 334 NLRB at 687. We assume for purposes our

gates have been tainted, we would authorize the issuance of complaint here.

Accordingly, the Region should, absent withdrawal, dismiss the complaint based only on its conclusion that the reserve gate system has been tainted.

B.J.K.

analysis that Rugby and Frick Lender Associates are a single employer with the Employer. However, because we find that General Electric does not apply, we need not decide this issue.